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APPELLANT PRO SE:

ANTHONY RAY FISHER
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

RICHARD C. WEBSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ANTHONY RAY FISHER,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee.

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No. 45A04-0603-PC-132

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Clarence D. Murray, Judge
The Honorable Kathleen A. Sullivan, Magistrate
Cause Nos. 45G02-0502-PC-0002, 45G02-0502-PC-0003 and 45G02-0502-PC-0004

December 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

In this pro se appeal, Appellant, Anthony Fisher, challenges the post-conviction court's denial of his petition for post-conviction relief. Upon appeal, Fisher claims the post-conviction court erred by denying his claim that he has yet to receive his due credit time.

We affirm.

On December 22, 1993, Fisher was sentenced to seven years and to thirty months for his convictions for burglary and theft, respectively, in Cause No. 45G02-9311-CF-00288 ("288"). The sentences were to run concurrently. At the time of sentencing on this case, Fisher had accrued forty-seven days credit time, which the court provided would be credited toward his sentence. At some point Fisher was released on parole.

On approximately September 8, 1997, Fisher was incarcerated in the Lake County Jail following his arrest on charges arising out of an incident occurring while he was on parole. More than a year later, he was transferred to the Department of Correction following his September 24, 1998 convictions and sentences for Possession of a Handgun as a Class C felony in Cause No. 45G02-9709-CF-00192 ("192"), Burglary as a Class C felony in Cause No. 45G02-9707-CF-00147 ("147"), and Escape as a Class C felony in Cause No. 45G02-9803-CF-00055 ("055"). At some point, Fisher was found to be in violation of his parole in Cause No. 288.¹

¹ The record contains no document determining Fisher to be in violation of his parole in Cause No. 288, but the court's sentencing orders in Cause Nos. 192, 147, and 055 state that Fisher had recently violated the conditions of his parole, and State's Exhibit G indicates Fisher did have a parole violation in Cause No. 288.

According to the pre-sentence investigation report prepared for Fisher's September 24, 1998 sentencing, Fisher had accumulated a total of 383 days jail time credit in Cause Nos. 192, 147, and 055. In sentencing Fisher to seven years on each of his new convictions, the court specified that the sentence in Cause No. 192 was to be served consecutively with the sentence imposed in Cause No. 147, and that Fisher was not to receive any days credit for Cause No. 192 because "the sentence is consecutive to the sentence imposed in [Cause No. 147]." App. at 54.² The court specified that the sentence in Cause No. 147 was to be served consecutively with the sentence in Cause No. 288, and that Fisher was not to receive any days credit for Cause No. 147 because "the sentence is consecutive to the sentence imposed in [Cause No. 288]." App. at 56. The court specified that the sentence in Cause No. 055 was to be served consecutively with the sentence in Cause No. 192, and that Fisher was not to receive credit time in Cause No. 055 because "the sentence is consecutive to the sentence imposed in [Cause No. 192]." App. at 58.

On October 28, 1999, Fisher filed a pro se Motion for Jail Credit and Good Time Allowance, which the court denied. Fisher filed a Motion for Reconsideration of Jail Time Credit and Good Time Allowance on January 12, 2001, which the court also denied. On February 17, 2005, Fisher filed a pro se petition for post-conviction relief alleging four grounds for relief. Following the State's general denial of Fisher's allegations in his petition and Fisher's subsequent motion to withdraw his petition

² For purposes of maintaining consistency, citations to the appendix are to the appendix in Cause No. 45G02-0502-PC-0003, which is the same appendix the State cites to in its brief.

without prejudice, the court dismissed the petition, noting that any subsequent petition would be treated as an amended petition. On September 14, 2005, Fisher filed a second petition for post-conviction relief,³ this time alleging only that the trial court erred in failing to give him his due “time served” and “good time” credit which he claimed he accrued from July 25 to July 29, 1997; from September 8, 1997 to March 18, 1998; and from March 20 to September 24, 1998. Following the court’s order setting the matter for hearing on December 6, 2005, Fisher filed a Motion to Expedite Proceedings, dated October 14, 2005, to which he attached Exhibits A-D, which he claimed supported his position.⁴ The court granted Fisher’s motion, re-setting the hearing to November 16, 2005, and later, to November 7, 2005.

During the November 7, 2005 hearing, the court ordered the State to file additional parole documentation, which the State did on December 6, 2005.⁵ Fisher did not object to the State’s request for thirty additional days to file such documentation. On February 8, 2006, the post-conviction court entered findings of fact and conclusions of law and

³ Fisher filed three separate amended petitions for post-conviction relief alleging the court erred in denying him “time served” and “good time” credit, specifying that in Post-Conviction Cause No. 45G02-0502-PC-0002, arising out of Cause No. 147, he was entitled to four days credit and four days good time credit for his confinement from July 25 to July 29, 1997; that in Post-Conviction Cause No. 45G02-0502-PC-0003, arising out of Cause No. 192, he was entitled to 191 days credit and 191 days good time credit for his confinement from September 8, 1997 to March 18, 1998; and that in Post-Conviction Cause No. 45G02-0502-PC-0004, arising out of Cause No. 055, he was entitled to 188 days credit with 188 days good time credit for his incarceration from March 20 to September 24, 1998. Fisher filed no petition challenging his sentence in Cause No. 288.

⁴ Fisher’s Exhibits A-D were admitted into evidence in the post-conviction hearing.

⁵ In response, Fisher filed a December 16, 2005 Rebuttal to State’s Supplemental Evidence, which the State addressed in its January 25, 2006 Response to Petitioner’s Rebuttal to State’s Supplemental Evidence, to which Fisher again on February 6, 2006 filed an objection and rebuttal. Fisher also filed a Motion for Order to Discharge on January 18, 2006, which the court denied.

denied Fisher's petition for post-conviction relief. Fisher filed his notice of appeal on February 27, 2006.⁶

Fisher filed his briefs on May 1 and 3, 2006. On May 23, 2006, he filed a Motion to Expedite Proceedings, which our court denied in a June 5, 2006 order. On May 26, 2006, the State filed a Verified Motion for Clarification and to Establish a Filing Date for Brief of Appellee. Our court ordered that Fisher's three appeals of his post-conviction petition were one consolidated appeal, and we further ordered that the State was to have thirty-five days from the June 5, 2006 date of our order to file its appellate brief. On June 10, 2006, the State filed its appellee's brief. On June 2, 2006, prior to our above order and to the State's filing of its appellee's brief, Fisher filed a Motion to Strike Brief of Appellee, Objection to Extension of Time, and Clarification of Briefing. Insofar as that motion was addressed by our June 5, 2006 order, we decline to modify our ruling. To the extent such motion is a new objection to the State's brief, we address that claim now.

In his motion Fisher argues that the State "waited until the day that the brief was due (May 26, 2006)" to file its motion for clarification and to establish a filing date. Fisher further argues, citing Indiana Appellate Rule 35, that any motion for extension of time must be filed at least seven days before the expiration of time. We first note that in our June 5, 2006 order, we determined that Fisher's three appeals constituted one

⁶ Fisher filed three separate notices of appeal, including three separate briefs and three separate appendices, contesting each of his three amended petitions for post-conviction relief filed under lower cause numbers 45G02-0502-PC-0002; 45G02-0502-PC-0003; and 45GO2-0502-PC-0004. These three petitions were consolidated for purposes of Fisher's post-conviction hearing. Although Fisher filed separate notices of appeal, these cases were consolidated on appeal under one cause number: 45A04-0603-PC-132.

consolidated appeal and that the proper filing date for two of Fisher's three briefs and appendices in this consolidated appeal was May 3, 2006. We further note that the State filed the motion Fisher now challenges on May 26, 2006, which was seven days prior to its June 2 deadline for filing an appellee's brief, or thirty days following Fisher's filing of his appellant's brief on May 3. Contrary to Fisher's claims, therefore, the State filed a timely Verified Motion for Clarification and to Establish a Filing Date for Brief of Appellee, as well as a timely brief. We find no error on this point.⁷

We turn now to Fisher's claim upon appeal that the post-conviction court abused its discretion in declining to award him his earned credit time. In considering Fisher's appeal, we are mindful that the petitioner bears the burden to establish his grounds for post-conviction relief by a preponderance of the evidence. Godby v. State, 809 N.E.2d 480, 481-82 (Ind. Ct. App. 2004) (citing Ind. Post-Conviction Rule 1(5)), trans. denied. To the extent the post-conviction court denied relief in the case at hand, Fisher is appealing from a negative judgment and faces the rigorous burden of showing that the evidence as a whole "leads unerringly and unmistakably to a conclusion opposite to that reached by the . . . court." Id. (quoting Williams v. State, 706 N.E.2d 149, 154 (Ind. 1999) (internal quotations omitted)). It is only where the evidence is without conflict and

⁷ In his June 2, 2006 Motion to Strike Brief of Appellee, Objection to Extension of Time, and Clarification of Briefing, Fisher further indicates, "That the state prosecutor requested and was granted a thirty (30) day extension of time to produce 'Parole Documentation' to verify that Appellant had received the credit time in question." Fisher did not, however, object to the court's consideration of this post-hearing evidence. To the contrary, he appeared to acquiesce so long as the court's extension of time did not continue past December 20, which it did not. To preserve an issue regarding admission of evidence for appeal, the complaining party must have made a contemporaneous objection to the evidence at the proceeding below. See Oldham v. State, 779 N.E.2d 1162, 1170 (Ind. Ct. App. 2002), trans. denied.

leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. Id.

“A person imprisoned for a crime or imprisoned awaiting trial or sentencing is initially assigned to Class I.” Ind. Code § 35-50-6-4(a) (Burns Code Ed. Repl. 1998). “A person assigned to Class I earns one (1) day of credit time for each day he is imprisoned for a crime or confined awaiting trial or sentencing.” Ind. Code § 35-50-6-3(a) (Burns Code Ed. Repl. 1998). “Confined awaiting trial or sentencing” has been held to mean confined as a result of the charge for which the defendant is being sentenced. Diedrich v. State, 744 N.E.2d 1004, 1005 (Ind. Ct. App. 2001). When a defendant is incarcerated on multiple unrelated charges at the same time, it is possible that a period of confinement may be the result of more than one offense. Id. If a person incarcerated awaiting trial on more than one charge is sentenced to concurrent terms for the separate crimes, I.C. § 35-50-6-3 entitles him to receive credit time applied against each separate term. Stephens v. State, 735 N.E.2d 278, 284 (Ind. Ct. App. 2000), trans. denied. However, where he receives consecutive terms he is allowed credit time only against the total or aggregate of the terms. Id.; see also Diedrich, 744 N.E.2d at 1006.

In establishing his case at the post-conviction hearing, Fisher introduced into evidence the following four exhibits: (1) a record from the Lake County Sheriff’s Department verifying that he was incarcerated in Cause No. 055 from September 10, 1997 to October 1, 1998, when he was transferred to the DOC; (2) a pre-sentence investigation report face sheet indicating, in Cause Nos. 147, 192, and 055, that Fisher had accumulated 4 days, 191 days, and 188 days of jail credit, respectively, totaling 383

days; (3) the trial court's sentencing order in Cause No. 192, indicating Fisher was not to receive credit time toward his sentence because such sentence was to be consecutive to the sentence in Cause No. 147; and (4) a DOC form detailing credit time calculations. Upon reviewing Fisher's exhibits, the court concluded that in the absence of documents showing otherwise, Fisher had met his burden to show that he had not received his due jail time credit.

The State's evidence introduced to refute Fisher's claim that he never received his due credit time included the following seven exhibits: the court's sentencing orders in Cause Nos. 192, 147, 055, and 288; an affidavit from DOC Release Coordinator Diana Kerrigan stating that Fisher's 383 days of credit time were to be served for his parole violation in Cause No. 288; a DOC sentencing detail form for Cause No. 147 stating, "Judge ordered 383 JTC be given on PV sentence;" and a DOC form for Cause No. 288 stating that jail time credit in Cause No. 147 was to apply to Cause No. 288 and indicating Fisher had been deprived of ninety days of good time credit as of December 5, 1998.⁸ App. at 63.

The post-conviction court found after reviewing this evidence and noting that Fisher had not filed a petition for post-conviction review challenging the assessment of credit time in Cause No. 288, that it was "clear that the court intended [Fisher's] jail time credit / good time credit should appl[y] toward the parole revocation sentence" in Cause

⁸ State's Exhibit G also states, "Available time has been changed to apply jail time credit from 9-7-98." This appears to conflict with the jail time credit calculation in Defendant's Exhibit B, the PSI face sheet, indicating that Fisher served time in jail beginning September 8, 1997. App. at 44. We note, however, that State's Exhibits E and F indicate the DOC recognized Fisher's jail time credit equaled 383 days.

No. 288. App. at 82. The court also found that the State's documents established that the DOC understood the court's intentions regarding credit time and that it had awarded Fisher, on his parole revocation sentence, all of the credit to which he was entitled.

In considering Fisher's claims, we note that, with respect to determining whether Fisher ever received his due credit time, the record provides an incomplete accounting of Fisher's sentences for each of his convictions; the dates he spent incarcerated for each of his sentences and the parole violation; and the credit time—both jail time and good time—which he accumulated and received, and precisely when it was applied. Although we are therefore unable to look to the record to determine exactly which days Fisher served for which offense, we are similarly unable to ascertain from the record that he did not receive his due credit time. There is no indication in the record that Fisher had fewer than 383 days left to serve on his sentence in Cause No. 288 at the time when his parole in that case was officially revoked.⁹ Further, Fisher's Exhibit D states that the maximum release date for Cause No. 288 was November 4, 2000 and that Fisher had only 487 days of earned credit time, yet it appears from State's Exhibit F that Fisher was already serving his sentence in Cause No. 147 on September 24, 1998, more than two years prior to his maximum release date in Cause No. 288, which supports a finding that Fisher's jail time credit had already been counted toward his parole violation in Cause No. 288. We further note that upon considering evidence including State's Exhibit F, which indicated

⁹ Although we note that Fisher claims in his reply brief that the petition to revoke parole and the parole revocation hearing were not held until after he was sentenced and confined to the DOC under Cause Nos. 192, 147, and 055, there is nothing in the record to this effect, nor does it appear that we have any documentation as to when the parole revocation actually occurred and what its terms were.

Fisher had been credited his 383 days of jail time credit to his parole violation sentence, and State's Exhibit G, which addressed Fisher's good time and jail time credit in Cause No. 288, the post-conviction court determined that Fisher had received his due credit time. In light of the evidence and the post-conviction court's ruling, we are unable to conclude from the record before us that the evidence leads unerringly and unmistakably to a conclusion opposite that reached by the post-conviction court. As we are unable on this record to determine that Fisher did not receive his due credit time, we affirm the post-conviction court's denial of Fisher's claim.

Having determined that the State's brief is properly before us and that Fisher has failed to demonstrate that the post-conviction court erred in denying his claim, we affirm the post-conviction court's denial of his claim.

The judgment of the post-conviction court is affirmed.

ROBB, J., and BARNES, J., concur.